Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-70

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371
and SOCIAL SERVICE EMPLOYEES UNION,
LOCAL 371 WELFARE FUND,

Petitioners,

v.

WOMEN IN CITY GOVERNMENT UNITED, et al.,

Respondents.

NO. 75-71

UNITED FEDERATION OF TEACHERS AND UNITED
FEDERATION OF TEACHERS WELFARE FUND,

Petitioners,

v.

WOMEN IN CITY GOVERNMENT UNITED, et al.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION

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IN THE

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MEMORANDUM IN OPPOSITION

Respondents oppose the grant of a writ of certiorari to review generally two orders of the United States Court of Appeals for the Second Circuit challenged by petitioners. However, respondents would not

oppose limited review of those orders with respect to the single issue which this court has already decided to consider in Wetzel v. Liberty Mutual Insurance Co., (No. 74-1245).

STATEMENT OF THE CASE

Petitioners seek review of an order of the United States Court of Appeals for the Second Circuit which had vacated an order of the United States District Court for the Southern District of New York, dismissing respondents' complaint on its face, and remanded the action. The district court's order of dismissal was based on its prior holding that respondents could not maintain an action for discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964 as amended ("Title VII"), 42 U.S.C. § 2000e, et seq. challenging a variety of health and welfare fringe benefit plans and programs which deny or limit benefits for conditions relating to pregnancy and maternity. In so ruling, the district court relied entirely on its interpretation and application of this Court's decision in Geduldig v. Aiello, 417 U.S. 484.[1] The Second Circuit's vacatur of the

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1/ The district court had entered a joint opinion and order in this case and in Communications Workers of America v. American Telephone & Telegraph Co., 379 F.Supp.

[... Fn. cont'd p.3]

order of dismissal followed its decision in Communications Workers of America v. American Telephone and Telegraph Co., 513 F.2d 1024 (2d Cir. 1975), holding that the decision in Aiello could not be applied to require dismissal of actions brought under Title VII.[2]

ARGUMENT

In our view the ruling of the Second Circuit in the Communications Workers case is

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Fn. 1/ cont'd from p.2

679 (S.D.N.Y. 1975) dismissing the complaints in both actions with leave to replead that the defendants' exclusion of pregnancy-related conditions from fringe benefit plans was a pretext for sex discrimination. This opinion and order was certified to the Second Circuit for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The certification was accepted in the Communications Workers case but rejected here. After respondents elected not to amend their complaint, the district court dismissed this action on the merits from which an appeal was taken.

2/ The defendant in the Communications Workers case, American Telephone & Telegraph Co., has filed a petition for certiorari (No. 74-1601) to review that decision.

clearly correct and its action in vacating the district court's order of dismissal herein and remanding this action is obviously appropriate. Nevertheless, in light of this Court's decision to grant certiorari in Wetzel v. Liberty Mutual Insurance Co., (No. 74-1245) to consider whether an "employer's exclusion of coverage for pregnancy-related disabilities from an employee disability income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964," and the current importance of this issue[3] the respondents would not oppose the granting of the writ of certiorari herein so that an authoritative ruling may be made by this Court in the context of the present action on the issue already presented by the Wetzel case.[4] However, certiorari, if

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3/ Petitions for certiorari have been filed by petitioners herein, by the defendant in Communications Workers and by the defendant in Gilbert v. General Electric Co. (No. 74-1589, 74-1590.)

4/ Respondents, by their complaint, in addition to challenging petitioners' disability income protection plans, also challenge petitioner's medical benefit plans, health and hospitalization insurance provided by respondents' employer and for which the petitioner unions have negotiated, and maternity leave policies enforced by the employer.

granted, should be limited to review of the Second Circuit orders with respect to the question presented in Wetzel.[5]

The single question presented in the petition submitted by the United Federation of Teachers ("UFT") and the United Federation of Teachers Welfare Fund ("UFT Fund")[6] and the second question presented in the petition submitted by the Social Service Employees Union ("SSEU") and the Social Service Employees Union Welfare Fund ("SSEU Fund")[7] are related to the question presented in Wetzel. However, they are inappropriate in that respondents' challenge to the petitioners' plans is based on their exclusion of benefits for disabilities and other medical conditions related to pregnancy, and not to an exclusion of benefits

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5/ The petitions for certiorari in Communications Workers and in Gilbert present the identical question raised in Wetzel.

6/ "Does the exclusion of pregnancy and related conditions from fringe benefit coverage provided by the Welfare Fund of a municipal labor organization representing public employees constitute sex discrimination proscribed by Title VII of the 1964 Civil Rights Act as amended?"

7/ "Is excluding pregnancy and related conditions from fringe benefit plan coverage proscribed discrimination under Title VII of the Civil Rights Act of 1964 as amended (Title VII)?"

for pregnancy itself. The wording of petitioners' questions gives the erroneous impression that respondents seek benefits for the mere occasion of pregnancy. To focus on the question presented in Wetzel will eliminate this source of potential confusion.

The SSEU and SSEU Fund also raise three additional questions,[8] none of which conforms to the requirements of Rule 23 of the Rules of this Court that the questions presented be expressed in the terms and circumstances of the case.

Petitioners' questions present issues much broader than those necessary for a resolution of the present action.[9] Perhaps the

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8/ (1) "Is it proscribed discrimination to provide a benefit or fail to provide a benefit to individuals who, because of physiology, would be the only ones affected thereby?"

* * *

(3) "What does invidious discrimination mean in the context of Title VII as it relates to pregnancy and related conditions?"

(4) "Does discrimination on grounds of sex (or gender) mean something different when the 14th Amendment is involved than when Title VII comes into play?"

9/ The first question regarding the general issue of discrimination (presumably under Title VII) on the basis of physiological characteristics obviously need not be answered in reviewing the Second Circuit's

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reason why petitioners had difficulty in framing questions in the "terms and circumstances" of this case is because no concrete factual context has yet developed herein within which their broadly framed questions

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Fn.9/ cont'd from p.6

orders. The question could have meaning only with respect to some particular physiological characteristic and the challenged action taken with respect to it. Moreover, we would doubt that this question could ever be answered in the abstract. Physiology (i.e., organic function) like levels of verbal ability may or may not have a disparate impact on a protected class under Title VII and may or may not be significantly related to job performance. In the absence of any record regarding the petitioners' general grant of disability benefits and the reasons for excluding disabilities relating to one particular physiological function, the question is incapable of resolution.

Petitioners' third question, asking this Court to explicate the meaning of "invidious discrimination ... in the context of Title VII" is disposed of by the simple fact that Title VII nowhere speaks of invidious discrimination so that that concept has no applicability and hence no meaning in this context of Title VII.

The petitioners' final question as to the meaning of discrimination on grounds of sex under the 14th Amendment and Title VII may be an appropriate topic for a law review article but it provides no clarification whatever of the issues in this case.

could possibly be answered.[10/]

There is no factual record evidencing the nature, details, operations and effect of the plans and policies challenged by respondents or any reasons or rationale for their challenged provisions. Thus petitioners' hypothetical and speculative questions are inappropriate for consideration if not incapable of meaningful resolution at this time.

10/ Unfortunately, after over one and one-half years of litigation, the parties are still at the most preliminary stages of this action. Discovery was stayed several months after the action was filed on the basis of motions for dismissal. There followed the district court's sua sponte dismissal and the appeal to the Second Circuit. After remand, motions for dismissal, summary judgment and severance raising numerous complex jurisdictional and other threshold questions were filed. The stay of discovery is now continued pending a decision on these preliminary motions and this Court's decision in Wetzel.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari, if granted, should be limited to consideration of the issue presented in Wetzel v. Liberty Mutual Insurance Co.

Respectfully submitted,

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